Supreme Court, U.S.
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No. 08-159

In The Supreme Court of the United States

WILLIE LEE,

Petitioner,

versus

DEPARTMENT OF POLICE,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana Court Of Appeal, Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

In *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), this Court held that, ordinarily, a civil servant may not be terminated or deprived of the property right in his job without a pre-deprivation hearing giving him an opportunity to respond or refute the charges against him. However, this Court also recognized that certain exceptions apply to this general rule.

The New Orleans Civil Service Commission ruled that the city government violated the Petitioner's right to due process of law when the Petitioner was terminated without a pre-termination hearing. The Louisiana, Court of Appeal, Fourth Circuit, and subsequently the Louisiana Supreme Court, held that the New Orleans Police Department could discipline officers without a pre-termination hearing under extraordinary events such as Hurricane Katrina. These courts further held that the post-termination hearing, which allowed for the presentation of all relevant evidence that would have been introduced at a pre-termination hearing, satisfied the due process requirements of both the United States and Louisiana Constitutions.

The issue presented for review is: Whether individual due process rights for tenured civil service employees may be satisfied by a post-termination hearing, under unique circumstances or extraordinary events such as a hurricane or flood, despite the requirement of a pre-termination hearing as set forth in *Loudermill*.

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STATEMENT OF JURISDICTION

This court has subject matter jurisdiction over this case under 28 U.S.C. § 1257(a), which confers jurisdiction on the Court by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

STATEMENT OF THE CASE

I. Facts Relevant to the Petition

The Petitioner was a police officer with the New Orleans Police Department and a classified employee in the civil service system. On Saturday, August 27, 2005, the Superintendent of the New Orleans Police Department placed the Department on "Activation Status" in order to mobilize personnel in preparation for Hurricane Katrina, which struck the City of New Orleans the following day. Pursuant to this activation, all essential personnel were required to report to and remain on duty until relieved by the Superintendent. The Petitioner was considered essential personnel but did not report to duty as required. As the Petitioner had still not reported to duty by October 24, 2005, the Department terminated his employment.

The Petitioner is one of a group of officers who did not report for duty during and in the immediate aftermath of Hurricane Katrina. Following Katrina, the Department's Public Integrity Bureau was tasked with investigating hundreds of claims against officers

that failed to report, like the Petitioner, or who abandoned their post during or subsequent to the hurricane. The Bureau was operating with a reduced staff and operating out of makeshift offices with little to no supplies or resources. The Bureau was also operating under the assumption that all claims against these officers that were not fully investigated within a sixty day period would be dismissed.[1]

In order to manage the daunting task of investigating these complaints in the wake of the storm, the Bureau divided abandonment cases into two categories: 1) officers who had abandoned their posts and not returned by a certain date; and, 2) officers who had abandoned their posts but eventually returned to duty seeking reinstatement. Because officers who had returned to duty were present and available, they were afforded pre-termination hearings. Those who had abandoned their posts and not returned were not afforded pre-termination hearings, as the Bureau's limited resources post-Katrina hampered their ability locate these officers. These officers, including the Petitioner, were afforded post-termination hearings.

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[1] The sixty day requirement was established in *Davis v. New Orleans Police Department*, 899 So.2d 37 (La. App. 4 Cir. 2005), *writ denied*, 902 So.2d 1057 (La. 5/20/05). This ruling was abrogated by the Louisiana Supreme Court in *Marks v. New Orleans Police Department*, 943 So.2d 1028 (La. 11/29/06).

II. Procedural History and Opinions Below

The Petitioner appealed his termination to the New Orleans Civil Service Commission on March 9, 2006. The Commission reviewed the matter, granted the appeal, and ordered the Department to reinstate the Petitioner solely on the basis that no pre-termination hearing took place. The Commission found this to be a violation of the Petitioner's due process rights.

The Respondent appealed the Commission's decision to the Louisiana Court of Appeal, Fourth Circuit, and that Court ordered an *en banc* review. Numerous terminated officers similarly situated to the Petitioner appealed as well. The Louisiana appellate court consolidated all cases similarly situated. On October 10, 2007, the Louisiana Court of Appeal, Fourth Circuit, reversed the New Orleans Civil Service Commission. The Court found that:

> We can hardly envision a scenario when enforcing appropriate standards of conduct was ever more important than in the aftermath of Hurricane Katrina. In addition, we find that the [Civil Service Commission's] rulings relying solely on the absence of a pre-termination hearing when truly extraordinary circumstances present themselves would set a dangerous precedent on future disciplinary actions of the [New Orleans Police Department].

Petitioner then filed a writ of certiorari to the Louisiana Supreme Court, which was denied on

February 15, 2008. This request for writ of certiorari followed.

ARGUMENT

CERTIORARI IS NOT WARRANTED BECAUSE THE LOWER COURT'S INTERPRETATION OF THE LAW IS NOT CONTRARY TO THE STANDARD ESTABLISHED IN *LOUDERMILL*, AS *LOUDERMILL* ALLOWS FOR AN EXCEPTION TO THE PRE-TERMINATION HEARING REQUIREMENT IN SOME CIRCUMSTANCES.

The Petitioner seeks a writ of certiorari from the 2008 decision of the Louisiana Court of Appeal, Fourth Circuit, certiorari denied by the Louisiana Supreme Court, which held the Petitioner's due process rights were not violated when he was terminated without a pre-termination hearing.[2]

Although this Court established in *Loudermill* that the appointing authority ordinarily must give a

[2] An interest in life, liberty, or property is a prerequisite to any due process challenge. *Bell v. Dep't of Health & Human Res.*, 483 So.2d 945 (La. 1986), *cert. denied*, 479 U.S. 827, 107 S.Ct. 105 (1986). Article I, § 2 of the 1974 Louisiana Constitution provides that an employee who has obtained classified civil-service status has a property right in his employment. Tenured or classified civil service status is a property right within the meaning of this Louisiana Constitutional provision, and thus guarantees due process. *Bell*, 483 So.2d 945 at 949. The Respondent does not challenge that the Petitioner had a property right in his employment for the purposes of this case.

civil servant the right to be heard *before* he is terminated from his position, the Court also acknowledged that there are some situations in which a post-deprivation hearing will satisfy due process requirements. 470 U.S. at 542 n.7. In the post-Katrina emergency landscape, a post-deprivation hearing such as the one afforded to the Petitioner sufficiently preserves an employee's due process rights.

I. Due process is not a fixed concept, and must be assessed in light of the demands of a particular situation.

"[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrisey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). In *Loudermill*, this Court recognized some situations in which a post-deprivation hearing will satisfy due process requirements. 470 U.S. at 542 n.7. "[T]he precise form and extent of process required in a particular situation will vary from other factual situations." *Mathews*, 424 U.S. at 332.

The Petitioner's strict interpretation of *Loudermill* is inaccurate, and inconsistent with other rulings by this Court. *Loudermill* cannot be read to require a uniform process in order to secure an employee's due process rights. *See Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Morrisey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). *Loudermill* merely establishes that, **in ordinary circumstances**, an employee must be afforded a pre-termination hearing. The nature of due process protections as established by this Court, as well as the exceptions acknowledged in *Loudermill*, allow for alternative means in securing due process rights. The fact that the Petitioner was not afforded a pre-termination hearing is not a per se violation of the Petitioner's due process rights.

II. The Government interest justifies the postponement of the opportunity to be heard until after the initial deprivation.

"An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." *FDIC v. Mallen*, 486 U.S. 230, 240, 108 S.Ct. 1780, 100 L.Ed.2d 265 (1988). *See also Graham v. Van Osdale,* 25 F.3d 1048 (Mich. App. 6th Cir. 1994); *Jones v. City of Gary, Ind.*, 57 F.3d 1435, 1441 (Ind. App. 7th Cir. 1995). When determining whether governmental procedures comport with the requirements of the

Constitution, the court must balance "the private interest that will be affected by the official action," "the risk of an erroneous deprivation of such interest through the procedures used," with "the Government's interest." *Gilbert v. Homar*, 520 U.S. 924 (1997) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). *See also City of Los Angeles v. David,* 538 U.S. 715, 716 (2003); *Wilkinson v. Austin,* 545 U.S. 209, 211 (2005); *U.S. v. James Daniel Good Real Property,* 510 U.S. 43 (1993).

The Petitioner did not display a significant interest in his continued employment. The Petitioner was ordered to report for duty on August 27, 2005. The Petitioner did not report for duty as ordered and abandoned his post. Even after being notified that his abandonment was to result in a thirty day suspension, the Petitioner did not return or notify the appropriate supervisors of an intent to do so. The Petitioner's failure to report to duty, even after being disciplined, is indicative of a diminished interest at best.

Furthermore, the Respondent took active measures to ensure that the risk of erroneous or wrongful termination was nearly nonexistent. The Respondent separated officers who had completely abandoned their post from those who returned to duty, and adjusted the disciplinary measures imposed on officers accordingly. Additionally, the Respondent afforded all officers who did not return to duty, regardless of how long they had abandoned their employment, a fair and thorough post-termination

hearing. This hearing allowed officers to fully present the same evidence that they would in a pre-termination hearing, and provided a safeguard against wrongful termination. *Lee v. Department of Police and all other Consolidated Cases*, No. 06-CA-1498 (La. App. 4th Cir. 2006).

Finally, the Government's interest in providing alternative means of securing the Petitioner's due process rights is considerable. The Respondent had a significant interest in ensuring public safety in the wake of Hurricane Katrina. Dependable public servants were essential to the control and rehabilitation of the City. All resources – including financial resources – were strained to an unprecedented extent, and the Respondent had a tremendous interest to remove non-working police officers from the payroll.

III. Hurricane Katrina constitutes an emergency situation for the purposes of postponing a hearing until after termination.

"[I]n some emergency situations, the employer can postpone the hearing until after the deprivation." *Bianchi v. City of Philadelphia*, 183 F.Supp.2d 726, 742 (E.D. Pa. 2002) (citing *Boddie v. Conn.*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971)). **This Court recognized in *Gilbert v. Homar* that "where a State must act quickly, or where it would be impractical to provide pre-deprivation process, post-deprivation process satisfies the requirements of the Due process Clause." 520 U.S. 924**

(1997). Again, this court acknowledged the need for such exceptions in *Loudermill*. 470 U.S. at 542 n.7.

The aftermath of Hurricane Katrina constitutes one of the greatest disasters in modern history. The aftermath is so significant, in fact, that the lower court specifically stated that it is "unnecessary . . . to describe the emergency conditions existing in New Orleans during and after Hurricane Katrina." *Lee v. Department of Police and all other Consolidated Cases*, No. 06-CA-1498 (La. App. 4th Cir. 2006). Pre-termination hearings were not only logistically difficult to accomplish in light of the diminished manpower and resources post-Katrina, but they were made nearly impossible due to the Petitioner and other similarly situated officers' absence. Often times, these officers' whereabouts were unknown. The state of emergency created by Hurricane Katrina is precisely the type of emergency that the exception in *Loudermill* and other similar cases intended to address. *See Loudermill*, 470 U.S. at 542 n.7. *See also Bianchi v. City of Philadelphia*, 183 F.Supp.2d 726, 742 (E.D. Pa. 2002).

The Petitioner contends that, even if there are circumstances in which the post-termination hearings are an adequate alternative, the Louisiana Court of Appeal, Fourth Circuit, failed to distinguish which circumstances would suffice to qualify for this exception. This is not a sufficient ground for a grant of certiorari. If the Court finds that the Respondent's actions were proper, and that the unique circumstances subsequent to Hurricane Katrina allowed for

an exception to the pre-termination hearing requirement, then there are no grounds on which certiorari should be granted. In this particular situation, under these unique conditions, a post-deprivation hearing was a sufficient due process protection.

The Petitioner places significant emphasis on the *Parratt-Hudson* doctrine, which has established that in certain circumstances a post-deprivation hearing was not feasible. The Petitioner attempts to distinguish this doctrine by stating that the instant case is not one of unusual circumstances in which a pre-deprivation hearing was not feasible, as is the case in both *Parratt* and *Hudson*. *See Parratt v. Taylor*, 451 U.S. 537 (1981); *Hudson v. Palmer*, 468 U.S. 517 (1984). The case at bar is one involving one of the greatest emergency and disaster situations of the country's history, and the exigent circumstances that resulted from Hurricane Katrina rendered a pre-deprivation hearing unfeasible. Most notably, those who now assert their right to a pre-termination hearing had fled the city and not reported their whereabouts to their supervisors. Quite simply, pre-termination hearings for these individuals were not feasible. To find that the post-termination hearing for these individuals was insufficient to satisfy their due process rights would set a dangerous precedent, and would require city officials to waste precious resources locating individuals who quite possibly were scattered throughout the country.

The Petitioner further contends that, even if there are circumstances in which the post-termination

hearings are an adequate alternative, the Louisiana Court of Appeal, Fourth Circuit, failed to distinguish which circumstances would suffice to qualify for this exception. This is not a sufficient ground for grant of certiorari. If the Court finds that the Respondent's actions were proper, and that the circumstances of Hurricane Katrina allowed for an exception to the pre-termination hearing requirement, then there are no grounds on which certiorari may be granted. To find otherwise would be a waste of judicial resources, and is a request for the Court to legislate regulations as opposed to determine the legal issues of the instant case. The particular circumstances of the case at bar are considerably unique. The Respondent's actions were in response to an overwhelming, catastrophic situation, and the Respondent took proactive measures to ensure the due process rights of the Petitioner and other similarly situated officers were satisfied to the best of their ability considering the extreme circumstances.

Additionally, the Petitioner alleges that the Respondent sought to suspend the Petitioner's due process rights. The Petitioner calls on this Court to address under what unique circumstances a government can suspend the Due Process Clause of the United States Constitution. This considerably overstates the Respondent's position, and calls upon the Court to make yet another unnecessary determination. The Respondent did not seek to suspend the Petitioner's due process rights. Rather, the Respondent sought to satisfy the Petitioner's due process

rights through alternative means, as the ordinary procedures could not be followed due to the circumstances caused by Hurricane Katrina.

Finally, this Court has previously denied certiorari in a nearly identical case. *Allen v. New Orleans Police Dept.*, 129 S.Ct. 236 (2008). The Petitioner's instant brief requesting writ of certiorari is nearly identical to a brief submitted in May of this year, raising identical issues of law and asking the Court to determine questions far beyond the scope of the case at bar.

CONCLUSION

Given the extraordinary conditions caused by Hurricane Katrina, the Due Process rights of the Petitioner were not violated when he was not afforded a pre-termination hearing. The Civil Service Commission conducted post-termination hearings for Petitioner and similarly situated officers, which were in accordance with the principal of law espoused for the property right protection, and was a valid balancing act by the government for those officers who abandoned their duty.

In advocating this position, the Respondent is not seeking to reverse well-settled precedent or repudiate the general requirement for conducting pre-termination hearings in ordinary circumstances established in *Loudermill*. Rather, the Respondent asserts that the conditions that existed post-Katrina constituted

extraordinary circumstances during which alternative measures were necessary in order to secure the Petitioner's due process rights. This exception is allowed under the *Loudermill* decision, and is a limited extension of the flexible due process requirements of *Bianchi, Boddie, Gilbert,* and *Mathews.* The writ should be denied.

Respectfully submitted,

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